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The Buy American Act, Trade Agreements Act, and Other Recent Domestic Preference Regimes

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Overview

- Introduction
- Buy American Act (BAA)
- Trade Agreements Act (TAA)
- BAA/TAA Implementation and Compliance
- Build America, Buy America – Infrastructure Investment and Jobs Act (IIJA)
- Inflation Reduction Act (IRA) – Domestic Content Rules

Buy American Act and Trade Agreements Act

- Buy American Act (BAA)
 - Law passed during the Great Depression to protect American manufacturing
 - Creates preference for the purchase of domestic supplies by the federal government, as well as for use of domestic materials on federal contracts for construction, alteration, repair of public buildings or public works
- Trade Agreements Act (TAA)
 - Law that allows the government to waive the BAA for products and materials made in certain countries that have entered into trade agreements with the U.S.
 - TAA applies when the value of the prime contract exceeds certain thresholds

Buy American Act (BAA)

- 1930s-era law to promote purchases of U.S. goods by federal agencies
- Implemented at FAR Part 25
- Product must qualify as a “domestic end product” (for supply contracts) or a “domestic construction material” (for construction contracts)
 - End product = articles, materials, supplies to be acquired for public use
 - Construction material = article, material, or supply brought to the construction site . . . for incorporation into the building or work
- Statute and regulations generally remained constant for decades, but last two administrations’ focus on boosting domestic manufacturing has led to significant changes

Buy American Act (BAA): Manufactured End Products / Construction Materials

- Two-part test for manufactured end products or construction materials that do not consist wholly or predominantly of iron or steel or a combination of both:
 - Product must be mined, produced, or manufactured in the United States, and
 - Cost of the product's components mined, produced, or manufactured in the United States must exceed 60% of the cost of all of its components
- For DoD supply contracts, end products and components manufactured in any of 28 “qualifying countries” are treated as domestic
 - These are countries with reciprocal defense procurement agreements with the United States
- For these non-iron/steel products and materials, the “cost of components” test is waived for commercially-available off-the-shelf (COTS) items

Buy American Act (BAA): Domestic Content

- The required “cost of components” percentage is on the rise
- The statute merely says manufactured “substantially all” from articles, materials or supplies mined, produced or manufactured in the United States
- Eisenhower Executive Order No. 10582 said 50%
 - This was the standard in the FAR for decades
- Trump Executive Order No. 13881
 - Led to increase to 55% in Jan. 2021
- Biden Executive Order No. 14005 led to additional increases
 - Increase to 60% as of Oct. 2022
 - For calendar years 2024 – 2028: will increase to 65%
 - For calendar year 2029 and beyond: will increase to 75%

Buy American Act (BAA): Iron and Steel End Products / Construction Materials

- New BAA category: end products/construction materials that “consist wholly or predominantly of iron or steel or a combination of both”
 - These are products/materials where the cost of iron and steel content exceeds 50% of the total cost of all components
- To qualify as domestic:
 - Product is manufactured in the United States, and
 - The cost of “foreign iron and steel” is less than 5% of the cost of all the components
- Foreign iron and steel = iron/steel products not produced in the U.S.
 - To be “produced in the U.S.,” all manufacturing processes must take place in the U.S., from initial melting to application of coatings
- But again, for DoD supply contracts, iron and steel produced in a “qualifying country” are treated as domestic

BAA “Cost of Components” Test

- Component is defined as “an article, material, or supply incorporated directly into an end product or construction material”
 - These are the top-level components or subassemblies that are incorporated into the end product or construction material that is delivered to the construction site
 - There is no need to consider subcomponents or raw materials that do not satisfy the definition of “component”
- Calculate the cost of each component and identify its country of manufacture
 - For purchased components, use acquisition cost + cost of transportation to place of incorporation into end product/construction material + any applicable duty
 - For components manufactured by the contractor, use all costs associated with manufacturing the component + allocable overhead (but not profit)

BAA Exceptions

- Public Interest
 - For example, agency agreements with foreign governments
- Nonavailability
 - Applies to supplies or construction materials that “are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality”
 - Class determinations listed at FAR 25.104
- Unreasonable cost – 20% evaluation factor
 - For supplies where lowest domestic offer is from small business, use 30%
 - For DoD supply contracts, use 50%
- Information technology that is a commercial product

BAA Compliance Challenge: What is “Manufactured”?

- The regulations include no definition of “manufactured”
- GAO decisions from 1980s and 1990s used broad definition
 - See *Marbex, Inc.*, B-225799 (May 4, 1987): (“completion of an article in the form required for use by the government”)
 - See *A&D Mach. Co.*, B-242546 (May 16, 1991) (“the item being purchased by the government is made suitable for its intended use and its identity established”)
 - But cosmetic changes, packaging, reassembly, etc. are not manufacturing
- Some federal courts have applied a more demanding definition
 - See *United States ex rel. Kress v. Masonry Sols. Int’l, Inc.*, No 12-1280 (E.D. La. 2015) (“if the operations performed on the foreign item create a basically new material or result in a substantial change in physical character”)

Trade Agreements Act (TAA)

- Allows the President to waive the BAA for end products and construction materials from certain “designated countries”
- There are currently 128 designated countries, in four categories:
 - WTO Government Procurement Agreement (GPA) countries
 - Includes 47 countries, including Canada, most of Europe, Israel, Japan, South Korea, Singapore, Hong Kong, Taiwan, Australia, and New Zealand
 - Free Trade Agreement (FTA) countries
 - Includes Mexico, Central America, and some South American and Middle Eastern countries
 - Least Developed countries
 - Includes 47 developing countries, mostly in Africa and Asia
 - Caribbean Basin countries
- Major non-TAA compliant countries include China, India, Malaysia, Pakistan, Thailand, and Vietnam

Trade Agreements Act (TAA): Applicability

- TAA applies at different dollar thresholds for different countries
 - Current thresholds for supply contracts:
 - Australia, CAFTA-DR, Chile, Colombia, Mexico, Singapore: \$92,319
 - WTO GPA and most other FTAs: \$183,000
 - Current thresholds for construction contracts:
 - Bahrain, Mexico, Oman: \$12,001,460
 - WTO GPA and other FTAs: \$7,032,000
- TAA is inapplicable to certain types of procurements (FAR 25.401)
 - For example, small business set-asides, acquisitions of arms/ammunition, etc.
- For DoD supply contracts, TAA applies only to certain Federal Supply Groups
 - Listed at DFARS 225.401-70

Trade Agreements Act (TAA): Country of Origin

- Unlike the BAA, there is no component analysis under the TAA “substantial transformation” test
- General test to qualify as a “designated country end product” or a “designated country construction material”:
 - Wholly the growth, product, or manufacture of a designated country, or
 - **Substantially transformed** in a designated country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed
- Generally, to qualify as “substantial transformation,” the manufacturing process must be relatively complex and require special tools/training
 - Simple screwdriver operations usually would not qualify
- U.S. Customs and Border Protection (Customs) has authority to make country of origin determinations for TAA purposes
 - Advisory Ruling v. Final Determination

Trade Agreements Act (TAA): U.S.-Made End Product

- For supply contracts, products can qualify as a “U.S.-made end product”
 - Product must be mined, produced or manufactured in the United States, or
 - Product must be substantially transformed in the United States into a new and different article of commerce with a name, character or use distinct from that of the article or articles from which it was transformed
- *Acetris Health, LLC v. United States*, 949 F.3d 719 (Fed. Cir. 2020)
 - Product can qualify as “U.S.-made end product” under the FAR TAA clause if manufactured in the United States from foreign-made components
 - Such products do not need to satisfy the “substantial transformation” test in order to be compliant with FAR TAA clause

Trade Agreements Act (TAA): Purchase Restriction

- TAA functions as both a BAA waiver and a purchase restriction
 - See FAR 25.403(c)(1): “in acquisitions covered by the WTO GPA, acquire only U.S.-made or designated country end products . . . unless offers for such end products . . . are not received or are insufficient to fulfill requirements.”
 - Similar language appears at DFARS 225.403(c)(i)
- In other words, for supply contracts, BAA exceptions are not available when WTO GPA threshold is met
 - But DoD has ability to issue a “national interest waiver” on a case-by-case basis
- Federal Supply Schedule (FSS) contracts
 - Note that the General Services Administration (GSA) and the Department of Veterans Affairs have determined that the TAA is applicable to all FSS contracts, even if a particular order is under the applicable threshold

BAA/TAA Implementation: Certifications and Notices

- For supply contracts, the BAA and the TAA are implemented through certifications included in Government solicitations
 - For example, FAR 52.225-2, Buy American Certificate:
 - “The Offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a domestic end product”
 - For example, FAR 52.225-6, Trade Agreements Certificate:
 - “The offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a U.S.-made or designated country end product”
- For construction contracts, the BAA and TAA are implemented through notice provisions included in Government solicitations
 - For example, FAR 52.225-10 and FAR 52.225-12

BAA/TAA Implementation: Contract Clauses

- The BAA and the TAA are also implemented through various contract clauses
 - Contract type and dollar amount will determine which clause applies
- Three main clauses applicable to supply contracts, with alternates:
 - FAR 52.225-1, Buy American—Supplies
 - FAR 52.225-3, Buy American—Free Trade Agreements—Israeli Trade Act
 - FAR 52.225-5, Trade Agreements
- Two main clauses applicable to construction contracts, with alternates:
 - 52.225-9, Buy American—Construction Materials
 - 52.225-11, Buy American—Construction Materials under Trade Agreements
- For DoD, unique clauses permit end products/components from qualifying countries

BAA/TAA Implementation: Contract Clauses

- FAR 52.225-1, Buy American—Supplies
 - “The Contractor shall deliver only domestic end products except to the extent that it specified delivery of foreign end products in the . . . ‘Buy American Certificate.’”
- FAR 52.225-5, Trade Agreements
 - “The Contractor shall deliver . . . only U.S.-made or designated country end products except to the extent that . . . it specified delivery of other end products in the . . . ‘Trade Agreements Certificate.’”
- 52.225-9, Buy American—Construction Materials
 - “The Contractor shall use only domestic construction material in performing this contract, except as provided [below].”
- 52.225-11, Buy American—Construction Materials under Trade Agreements
 - “The Contractor shall use only domestic or designated country construction material in performing this contract, except as provided [below].”

BAA/TAA: Risks of Non-Compliance

- Bid protests and potential loss of awarded contract
- Removal and replacement of non-compliant products/materials
- Price reductions
- Termination for default
- Suspension or debarment
- Inspector General or Department of Justice investigations
- False Claims Act (FCA) or criminal fraud liability

BAA/TAA Risk Area: Bid Protests

- Losing bidders can and will challenge whether the awardee's offered product complies with the BAA and TAA
- However, the standard applied at GAO and the Court of Federal Claims is deferential to the Agency and an offeror's representations/certifications of compliance
 - General Rule: “[W]here an agency has no information prior to award that would lead to the conclusion that the vendor, or the product or service to be provided, fails to comply with the solicitation’s eligibility requirements, the agency can reasonably rely upon a vendor’s representation/certification of compliance.” *Sierra7, Inc.; V3Gate, LLC*, B-421109.4, Jan. 4, 2023, 2023 CPD ¶ 55
- Thus, allegations will be denied unless the agency has information, or there is information in the proposal, that would place the agency on notice of potential non-compliance or reasonably cause the agency to question the certification
 - BAA
 - *Sea Box, Inc.*, B-420130.2, Nov. 18, 2021, 2021 CPD ¶ 364
 - TAA
 - *Konecranes Nuclear Equip. & Servs., LLC v. United States*, 165 Fed. Cl. 421, 435 (2023)
 - *Kipper Tool Co.*, B-409585.3, June 19, 2014, 2014 CPD ¶ 184

BAA/TAA Risk Area: False Claims Act Liability

- FCA settlements involving allegations of non-compliant sales or products
 - November 2023 – London Bridge Trading Company pays \$2.1 million to resolve FCA allegations that it failed to comply with the BAA, TAA, and Berry Amendment in selling textile-based products to DoD
 - December 2022 – Coloplast pays \$14,547,347 to settle violations of the TAA and Price Reduction Clause that it self-disclosed under its contract with the Department of Veterans Affairs
 - August 2022 - Novo Nordisk Inc. pays \$6.3 million to resolve FCA allegations related to violations of the TAA under several contracts relating to payment for medical devices
 - August 2019 – Ambu, Inc. pays \$3.3 million to resolve FCA allegations that it sold products manufactured in China and Malaysia in violation of the TAA

BAA/TAA: Tips and Tricks

- Ensure project managers and purchasing staff understand requirements
- If current manufacturing process/location is not compliant, consider setting up separate BAA/TAA compliant manufacturing processes for Government sales
- Identify the applicable requirements early in the procurement process
 - This may involve communicating with Contracting Officer to remove conflicting or incorrect provisions or clauses
- Ensure all certifications and representations are accurate, vetted, and current
- Notify subcontractors and suppliers of requirements prior to obtaining quotes
- Flow down applicable requirements to subcontracts/purchase orders

IIJA: Build America, Buy America

- Passed as part of Infrastructure Investment and Jobs Act in November 2021
- Applies to all federal financial assistance awards for infrastructure projects
 - Not limited to projects funded by IIJA
 - Infrastructure is broadly defined and broadly interpreted
 - Includes roads, highways, bridges, public transportation, dams, ports, harbors, other maritime facilities, intercity passenger and freight railroads, freight and intermodal facilities, airports, water systems (including drinking water and wastewater systems), electrical transmission facilities and systems, utilities, broadband infrastructure, buildings and real property, and structures/facilities/equipment involved in EV charging
- Key requirements:
 - All iron, steel, manufactured products and construction materials used in an infrastructure project must be produced in the United States

IIJA: Build America, Buy America

- Implementation
 - April 2022 – OMB issued initial implementation guidance
 - February 2023 – OMB issued proposed update to OMB Guidance for Grants and Agreements (found at 2 C.F.R.)
 - August 2023 – OMB issued final update to OMB Guidance, effective Oct. 2023
 - October 2023 – OMB issued updated implementation guidance
- Updates to OMB Guidance
 - New Part 184: “Buy America Preferences for Infrastructure Projects”
 - Revised Section 200.322: “Domestic preferences for procurements”

IIJA: Build America, Buy America

- Iron/steel products
 - Materials that consist wholly or predominantly of iron or steel or a combination of both; predominantly = cost of iron/steel exceeds 50% of cost of all components
 - Test: all manufacturing processes, from initial melting through application of coatings, must occur in the United States
- Manufactured products
 - Materials that are processed into a specific form and shape, or combined with other materials to create a different product with different properties
 - Test: (1) the product must be manufactured in the United States, and (2) the product's components mined, produced, or manufactured in the United States must exceed 55% of the cost of all of its components

IIJA: Build America, Buy America

- Construction materials
 - Materials that consist of only one of the following items: non-ferrous metals, plastic and polymer-based products, glass, fiber optic cable, optical fiber, lumber, engineered wood, and drywall
 - Minor additions of other items or binding agents does not change the categorization
 - Category does not include cement and cementitious materials, aggregates such as stone, sand or gravel, or aggregate binding agents or additives
 - Test: all manufacturing processes must occur in the United States
 - More precise test for each type of construction material is found at 2 C.F.R. 184.6
- Categorization of each product/material
 - Made based on status at the time it is brought to the work site for incorporation into the infrastructure project

IIJA: Build America, Buy America

- Waiver availability
 - Public interest
 - Nonavailability
 - Compliant materials “not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality”
 - Unreasonable cost
 - Inclusion of compliant materials will increase the cost of the overall project by more than 25%
- Waiver process
 - Proposed waiver and agency’s written determination must be published online
 - 15-day public comment period is required
 - OMB Made in America Office must conduct final review

Inflation Reduction Act Domestic Preference Rules

- Inflation Reduction Act (IRA) signed by President on August 16, 2022
- Provides for “bonus credits” that allow a taxpayer to increase the amount of a tax credit for certain qualified facilities or energy projects
 - Renewable electricity production credit – IRC Section 45
 - Clean electricity production credit – IRC Section 45Y
 - Energy investment credit – IRC Section 48
 - Clean electricity investment credit – IRC Section 48E
- These bonus credits include domestic content requirements
 - Borrows from the domestic content tests used in the Federal Transit Administration (FTA) Buy America requirements at 49 C.F.R. 661.5
- Treasury/IRS issued guidance on May 12, 2023

Inflation Reduction Act Domestic Preference Rules

- Two categories:
 - Iron/steel = materials made primarily of iron or steel that are structural in function
 - Manufactured products = items produced as a result of a manufacturing process
- Requirements to qualify for bonus credits
 - First, all iron/steel in the facility/project must be produced in the United States
 - All manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives
 - Second, the “adjusted percentage” of the total costs of all manufactured products in the facility/project must be attributable to manufactured products (including components) that are mined, produced or manufactured in the United States
 - The adjusted percentage is 40% for projects beginning construction before 2025

Inflation Reduction Act Domestic Preference Rules

- Manufactured product – produced in the United States
 - All manufacturing processes for the product must take place in the U.S. and **100%** of the components of the product must be manufactured in the U.S.
- Satisfying the “adjusted percentage” rule
 - When calculating the domestic cost percentage, include in the numerator the sum of (1) the costs of manufactured products produced in the U.S. and (2) the costs of U.S.-manufactured components of other manufactured products
 - When calculating the costs of each manufactured product or component, only include direct material and labor costs that are paid or incurred by the manufacturer of the product
 - In other words, the price paid by the grant recipient or the construction contractor for the manufactured product is not relevant

Other Domestic Preference Regimes

- Federal Transit Administration – 49 C.F.R. Part 661
 - Applies to federally-assisted procurements using FTA funds
- Federal Aviation Administration – 49 U.S.C. 50101
 - Applies to Airport Improvement Program funded projects
- Federal Railroad Administration – 49 U.S.C. 22905(a)
 - Applies to several FRA grant programs
- Amtrak – 49 USC 24305(f)
 - Applies to Amtrak procurements using its own funds
- Federal Highway Administration – 23 CFR 635.410
 - Applies to federally-funded highway construction projects
- Rural Utilities Service – 7 CFR Part 1787
 - Applies to RUS loan programs

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Jamie Tabb has a full-service government contracts practice, in which he represents contractors in bid protests, contract disputes, and other litigation. While focused primarily on federal contracts, Jamie also has experience at the state and local level. For over 16 years he has litigated bid protests at the Government Accountability Office (GAO) and Court of Federal Claims (COFC) and filed claims and prosecuted appeals at the Boards of Contract Appeals and COFC. Jamie also counsels contractors on regulatory and contractual compliance issues. He advises clients on the Federal Acquisition Regulation (FAR) and other agency-specific procurement regulations, the Small Business Administration (SBA) regulations, and statutes applicable to federal contracting including the Buy American Act and the Trade Agreements Act. He provides guidance to clients participating in mergers and acquisitions involving government contractors and assists companies with the process of mitigating Foreign Ownership, Control or Influence (FOCI) to obtain or retain a facility security clearance.

Experience Highlights

- Prepared and litigated a bid protest at the GAO challenging a U.S. Army contract award for intelligence support services in Afghanistan that was sustained by GAO in a written decision
- Played a leading role in negotiating the settlement of a dispute relating to a major Treasury Department information technology contract; V&E was negotiation counsel
- Successfully defended against a GAO bid protest of a U.S. Army contract for infrared weapon sights and enhanced night vision goggles
- Litigated a contract dispute relating to an undefinitized U.S. Air Force letter contract for Programmed Depot Maintenance on a C-130 aircraft at the Court of Federal Claims, and helped negotiate a settlement through mediation
- Assisted with the development of a plan to mitigate FOCI in connection with the acquisition of a prominent government contractor
- Advised a leading investment firm on the implications of acquiring a government contractor and the process of novating the contracts at issue
- Successfully defended against a GAO protest challenging the award to our client of a task order for video analysis in support of the National Geospatial-Intelligence Agency's counterintelligence operations
- Drafted a GAO bid protest of a U.S. Army Corps of Engineers contract award for personal services in Iraq that caused the Corps to take immediate corrective action; our client later won the re-competed contract
- Prepared a protest of a U.S. Air Force contract award for operation and maintenance of a remote radar system that caused the Air Force to take corrective action

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Tyler's practice focuses on all aspects of government contracting from procurement through performance. He regularly represents government contractors in litigation matters, including litigating bid protests at the Government Accountability Office (GAO) and the Court of Federal Claims (COFC); filing and responding to contract claims; prosecuting claim appeals at the different Boards of Contract Appeals; and litigating subcontractor dispute issues. Tyler also counsels and assists government contractors on contract and regulatory compliance matters involving the Federal Acquisition Regulation (FAR), agency supplemental acquisition regulations, and Small Business Administration (SBA) regulations. In addition, he also advises contractors and subcontractors on a broad range of government contract matters, including teaming agreement negotiations, subcontract formation and performance issues, organizational conflicts of interest (OCIs), ethics and procurement integrity laws, government and internal investigations, Cost Accounting Standards (CAS) compliance issues, and suspension and debarment proceedings.

Experience Highlights

- Assisted Fortune 100 contractor prepare and submit a damages claim under an Energy Savings Performance Contract (ESPC) to U.S. Army Corps of Engineers (USACE) for project cancellation, resulting in a settlement worth more than 90% of submitted claim amount within months of submission and despite USACE denying similar claims by other contractors and an adverse Armed Services Board of Contract Appeals decision in a related matter
- (GAO; COFC) — Assisted in numerous GAO and COFC protests involving high-value contract awards by multiple Defense and Civilian Agencies
- Lead associate representing defense contractor investigate and respond to allegations of violations of the Procurement Integrity Act (PIA) during the course of an ongoing procurement, which resulted in a positive outcome and eventual contract award for our client
- (CBCA) – Lead associate representing a Private Collection Agency in litigation against the Government for unpaid performance bonuses, which resulted in favorable settlement for client
- (E.D. Va.) – Represented defense contractor in investigation and litigation of trade secret misappropriation, breach of contract, and breach of fiduciary duty claims against former employee
- Assisted government contractor with responding to subpoena from the Office of Inspector General (OIG)
- (ASBCA) — Lead associate on several Contract Disputes Act (CDA) appeals collectively worth tens of millions of dollars for a major Defense Logistics Agency contractor

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